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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1034

GEORGE F. DRISCOLL COMPANY, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the judges of the Court of Claims (R. 31-38) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 38). A motion for a new trial, filed by petitioner on November 29, 1945 (R. 38), was denied by the court below on January 7, 1946. The petition for a writ of certiorari was filed on April 1, 1946 (R. 39). The jurisdiction of this Court is invoked under Section

3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, under the provisions of Article 15 of a standard form Government contract, an unappealed determination by the contracting officer that it was the contractor's duty, under the contract provisions, to locate underground water installations so as to avoid their breakage and the consequent interruption of water service, and that the United States had not, in the circumstances of this case, relieved the contractor of that duty, was final and conclusive upon the contractor's right to receive reimbursement for expenses it incurred in repairing such a break and supplying interim water service.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

On October 22, 1934, petitioner entered into a construction contract with the United States, acting in this respect by the Acting Director of Procurement, Treasury Department, to erect two buildings and to effect additions and alterations to others on Ellis Island, New York (R. 6-20). As the existing buildings were to be occupied during the performance of the contract, paragraph 987 of the contract specifications (*infra*,

p. 16) required petitioner, during the period of such performance, to "maintain the cold water, hot water, sewers, * * * and all other services * * * supplying these buildings." Paragraphs 988 and 989 of the specifications further provided as follows:

988. Especial attention is called to the fact that piping, conduits, and traps, etc., in place in present covered walks, etc. are not shown on drawings, and bidders should visit site to fully inform themselves of the conditions.

989. When services are encountered in excavations, etc. (including excavations for buildings) they must be offset and reconnected by this contractor so as to furnish uninterrupted services to the occupied buildings. Any abandoned or dead service pipes encountered must be removed to outside of excavation and be plugged tight as directed.

On May 1, 1935, petitioner was engaged in constructing the foundation wall of a covered passage between two buildings which, as required by the contract, was to be supported upon piles to be driven at points designated by the construction plans furnished petitioner (R. 25). After a number of such piles had been installed on six foot centers, petitioner approached a point where it appeared that the next pile to be driven would be very close to the supposed location of an underground water pipe. This main was known to

enter the Island at a point approximately 100 or 125 feet distant from the line along which petitioner was proceeding to drive the piles, and to be connected to a vertical riser, appearing above ground some five feet the other side of that line. On the assumption, which later proved incorrect, that the main followed a straight line between these two known points, it appeared to petitioner that the pile it was about to drive might break the main. (R. 26.)

Accordingly, a conference was held between various of the contractor's and Government's construction supervisors (R. 26). Neither party had any information as to the underground depth of the main at the point at which the pile was to be driven, although it was known to enter the Island at a depth of approximately 23 feet (R. 25, 26). Information on this question was sought from the assistant superintendent in charge of Ellis Island, who stated that he thought the main would be found at that point to be some 10 feet below the surface (R. 27). The Government's construction engineer at first suggested that petitioner dig down to the pipe and there make a connection with it which petitioner was in any event required to do under its contract (R. 26). Petitioner demurred on the ground that an excavation of this size would be unnecessary since the new pipes it was required to connect with the main were to be laid at a depth of only three feet, and that this could be accomplished by making

the connection with the vertical riser at that level (R. 26, 27). In view of this objection, the Government's construction engineer then indicated a point two and one half feet away from the original point at which the pile was to be driven, and instructed petitioner to drive the pile at that point. The permission thus given petitioner to deviate from the plans was expressly conditioned upon instructions that petitioner probe the ground before driving the pile to determine whether it would strike the main. (R. 27.)

Following receipt of these instructions, petitioner's workmen probed for the main to the depth of sixteen feet six inches without encountering it. Petitioner then obtained authorization from the Government's assistant construction engineer to drive the pile at the new point,¹ and, in so installing the pile, struck and broke the main at a depth of sixteen and three quarters feet—some three inches below the lowest point to which petitioner had probed. A complete failure of the water supply to the existing buildings resulted. (R. 27.)

As soon as the fact that the main had been broken became apparent, petitioner was orally instructed by the Government's construction engineer to repair it (R. 26-27). Petitioner immediately commenced repair operations and re-

¹ Paragraph 108 of the Specifications (*infra*, pp. 15-16) required that all piles be driven in the presence of the construction engineer.

connected the main on May 7th (R. 28). In the meantime, petitioner supplied water to the Island first by tugs and later through a rented hose line extending from the New Jersey shore (*id.*).

While the repair work was in progress, petitioner, on May 3, 1935, wrote the Government's construction engineer making claim to reimbursement for the costs of the repairs in the event "it is established that the main is not as indicated on the drawings * * * " (R. 28). The reply of the construction engineer, dated May 11, 1935, called attention, *inter alia*, to Sections 987, 988 and 989 of the specifications (see *supra*, p. 3), and stated (R. 29):

If all the above-mentioned paragraphs of the specifications had been followed, the damage to the water main would not have occurred, and it is the writer's opinion that there can be no possible claim for additional compensation for the repair of this damage.

On June 5, 1935, following completion of the repair work, petitioner submitted a change proposal to the Procurement Division, Public Works Branch, requesting payment for the actual cost of the extra work involved, plus ten per cent of that sum for overhead and an additional ten per cent for profit, or in all \$8,478. On September 16, 1935, petitioner was informed by the Procurement Division that, following an investigation of the matter, its claim was rejected. The letter of

the Procurement Division further stated that no objection would be interposed by that Division should the petitioner desire to appeal its decision to the Office of the Comptroller General. (R. 29.)

Article 15 of the contract provided that, with the usual exceptions, "all other disputes concerning questions arising under" the contract should be decided by the contracting officer, subject to written appeal, within thirty days, to the head of the Department concerned whose decision on the matter should be final and conclusive as to such questions. Petitioner took no appeal from the adverse decision of the Procurement Division to the Secretary of the Treasury. On July 16, 1937, some twenty-two months after the decision of the Procurement Division, petitioner referred the matter to the Comptroller General (R. 5), who denied the claim on May 12, 1939 (R. 5, 30).

The instant action was commenced by petitioner on May 21, 1941, to recover the expenses it incurred in repairing the main and supplying interim water service. The complaint (R. 1-6) alleged as a sole basis of recovery that certain drawings furnished petitioner by the Government had incorrectly located the main, that petitioner had been misled thereby, and that the break "was not due to any negligence or lack of care or precaution on the part of plaintiff" (R. 2-3).

The court below made the following findings with respect to the contract drawings (R. 25):

6. Paragraph 1 * * * of the specifications lists by number the contract drawings, one of which relates to plumbing and heating and is largely diagrammatic in character.

* * * * *

This diagrammatic drawing gave no dimensional data which would indicate the location of the existing underground water main with reference to the wall of the passageway, [or] the depth of the same underground * * *.

7. Another contract drawing * * * disclosed in no way either the supposed or actual location of the underground water main with reference to the wall of the passageway and the required pile work therefor.

8. Paragraph 2 * * * of the specifications referred to a second set of drawings by number. This paragraph made reference to these drawings as relating to conditons of the site and stated with reference to them that they—

are not to become contract drawings. They are furnished bidders only for such use as they may choose to make of them. The accuracy of data given on these drawings is not guaranteed.

Two judges of the court below held that petitioner's claim was precluded under the terms of

Article 15 of the contract because of its failure to appeal from the adverse decision of the contracting officer, issued on September 16, 1935 (R. 31-34); a third judge concurred on the ground that the contract obligations required petitioner to probe to the full depth that the pile was to be driven before proceeding to do so (R. 34-35). Separate dissenting opinions were filed by the other two judges of the court below (R. 35-36, 36-38).

ARGUMENT

Petitioner urges (1) that its claim to reimbursement for its expenses in repairing the main and furnishing interim water service did not present a dispute "concerning questions arising under" the contract within the meaning of Article 15, and (2) that if Article 15 was intended to apply, the decision thereunder involved solely a matter of law as to which the parties could not validly agree to be bound by the ruling of "an administrative officer of the government." (Pet. 8, 9.)²

² Petitioner's remaining question presented, whether it was denied "due process" because the opinions filed by the judges concurring in the judgment revealed divergent theories for denying petitioner recovery, is obviously without merit. The holding that the petitioner is not entitled to the relief sought, having been concurred in by the majority of the court below, became the judgment of that court. Compare the situation presented by the affirmance by an equally divided court of a judgment entered by an inferior court.

1. Petitioner's request of the Government's construction engineer for a change order reimbursing it for the expenses incurred, and the engineer's denial of that request, clearly generated a dispute "concerning questions arising under this contract." Moreover, the fact that the claim for reimbursement was made after the event (Cf. Pet. 14) cannot obscure the fact that the dispute turned initially upon the question of whether petitioner, under the terms of the contract, was under an affirmative duty, in the course of its construction work, to locate underground water installations so as to avoid their breakage and the consequent interruption of water service to the Island. Had petitioner objected to the instructions it received on May 1, 1935, to probe for the main before driving the pile on the ground that the Government was under an obligation to inform it of the precise location of the main, the issue thus raised would have required a determination of the Government's and the contractor's respective obligation in this respect. The dispute actually arising over petitioner's claim to reimbursement required that the same determination be made. For the solution of that issue, reference necessarily had to be made to the provisions of the contract. Whether these provisions applied or controlled was peculiarly a matter for the determination of the contracting officer. The competence of a contracting officer under Article

15 to resolve disputes as to the duties placed upon a contractor by the terms of the contract as "questions arising under the contract" has repeatedly been recognized by this Court, and the officer's ruling thereon, absent a showing of bad faith or of error so gross as to imply bad faith, is conclusive.³ See, *e. g.*, *United States v. McShain*, 308 U. S. 512; *Plumley v. United States*, 226 U. S. 545; *Ripley v. United States*, 223 U. S. 695; *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387.

While petitioner states (Pet. 4) that the contract specifications had no application to the question of petitioner's obligations with respect to underground installations, we submit that the terms of the contract squarely placed petitioner under an affirmative duty to avoid breakage of such facilities. An awareness that the presence of underground structures would present difficulties with respect to the construction work to be performed by the contractor is repeatedly demonstrated by the terms of the contract. The responsibility for their avoidance was impliedly if not specifically placed on the contractor by

³ Petitioner makes no specific argument, nor did it below (R. 33), that the ruling of the contracting officer was arbitrary, capricious, or grossly erroneous. As before stated, the petition it filed below sought recovery on the sole ground that the drawings furnished it did not correctly place the main and that petitioner, in justified reliance thereon, had been misled to its detriment. This contention is entirely disposed of by the findings below. See *supra*, p. 8, R. 25.

paragraph 987 of the specifications which required petitioner to "maintain the cold water, hot water, sewers * * * and all other services * * * supplying" the existing buildings (*infra*, p. 16, R. 23). Equally significant is paragraph 988 of the specifications which called "especial attention" to the fact that the location of these installations was not shown on the contract drawings (*infra*, p. 16, R. 23). Such drawings as did contain any data with respect to them were "not to become contract drawings" (Specifications, paragraph 2, *infra*, p. 15, R. 25). They were "furnished bidders only for such use as they may choose to make of them", and the accuracy of the data contained therein was not guaranteed (*id.*). These admonitory paragraphs, it is submitted, could have had no other purpose than to advise the contractor that the Government neither knew nor assumed responsibility for the location of the underground pipes but instead placed that responsibility on the contractor.

Having decided, correctly we submit, that the contract required petitioner to locate the main, the contracting officer was faced with a further question—whether the action of the Government's construction engineers, on May 1, 1935, released petitioner from such duty and constituted a Governmental assumption of the risk of breaking the main. This involved a resolution as to a disputed issue of fact with reference to the scope of the

contracting officer's authorization to proceed, and as to which the unappealed decision of the contracting officer was patently conclusive under the provisions of Article 15. *United States v. Callahan Walker Co.*, 317 U. S. 56, 61; *United States v. Blair*, 321 U. S. 730, 735-737.

2. Petitioner's contention to the contrary notwithstanding (Pet. 10-11), this case does not raise the same issue as that involved in *Beuttas v. United States*, 101 Ct. Cls. 748, reversed, 324 U. S. 768. In that case, the contractor had exhausted the remedies provided it by Article 15 by appealing to the department head; here, however, petitioner took no appeal to the Secretary of the Treasury.⁴ Whatever the finality of Article 15 with respect to pure questions of law, and whatever the validity of petitioner's contention that the issue between it and the Government was purely one of law (cf. R. 33), it is clear that Article 15 validly requires an exhaustion of the administrative remedies made available therein. If this were not so, the Government would be denied the opportunity to correct the improper

⁴ Petitioner's reiterated reference (Pet. 5, 15, 16) to the fact that there was no finding below as to the identity of the contracting officer or the Department head would seem pointless. The first paragraph of the contract (R. 6) identifies the contracting officer as the person "executing this contract", i. e., the Acting Director of Procurement, Treasury Department (R. 20). It is equally apparent that the "head of the Department concerned" was the Secretary of the Treasury.

action of subordinate officials. *United States v. Blair*, 321 U. S. 730, 735; *United States v. Callahan Walker Co.*, 317 U. S. 56, 61. Only after a fruitless appeal to the department head could the questions mooted in the *Beuttas* case be presented.

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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MAY 1946.





APPENDIX

Contract dated October 22, 1934, between the United States (Procurement Division, Treasury Department) and George F. Driscoll Company (contractor). Article 15 reads as follows:

ART. 15. *Disputes*.—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Specifications of the aforementioned contract, Nos. 2, 108, 987, 988, and 989, read as follows:

2. Drawings Nos. 1-400 to 1-409 inclusive, 1-401-A, 1-403-A, 1-405A, 1-411, 1-412, 1-413, 1-P-450 relating to conditions of the site are not to become contract drawings. They are furnished bidders only for such use as they may choose to make of them. The accuracy of data given on these drawings is not guaranteed.

108. *Driving*.—Piles shall not be driven until after the excavation is completed.